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In The
Supreme Court of the United States
October Term, 1983

———o———

JOHN PROUD, Individually and as Next Friend of HEATHER PROUD, a Minor,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

———o———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

———o———

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QUESTION PRESENTED

Whether the Hawaii Recreational Use Statute, which exempts private landowners who open up private lands for public recreational use from liability for simple negligence but which also expressly does not exempt the government as landowner from liability for simple negligence, operates as a bar to suits for simple negligence against the United States Government under the Federal Tort Claims Act by persons who are injured while visiting national parks in Hawaii.

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No. _____

In The
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JOHN PROUD, Individually and as Next Friend of HEATHER PROUD, a Minor,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, John Proud and Heather Proud, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 12, 1984.

OPINION BELOW

The Opinion of the Court of Appeals, reported in 723 F.2d 705, appears in Appendix 1 hereto.[1] No published opinion was rendered by the United States District Court for the District of Hawaii. The Judgments of the District Court dismissing the complaint without prejudice, denying the motion for reconsideration and entering final judgment in favor of Defendants and against Petitioners appear in the Appendix. (Appendix 5, 4, 2.) The United States Department of Interior's denial of Petitioners' administrative claim appears in the Appendix. (Appendix 6.)

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on January 12, 1984. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and §2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the United States Constitution, Article VI, Section 2 and the Fourteenth Amendment Section 1, the Federal Tort Claims Act, 28 U.S.C. §1346(b)

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[1] The earlier unpublished opinion of the United States Court of Appeals for the Ninth Circuit dismissing a prior appeal in this case for lack of final appealable order appears in the Appendix. (Appendix 3.)

and §2674 and the Hawaii Recreational Use Statute, Hawaii Revised Statutes, Chapter 520, et seq., which are set forth in the Appendix. (Appendix 8, 9, 10, 11, 12.)

STATEMENT OF THE CASE

On March 30, 1979, Heather Proud dove into a natural fresh water pool located in the Haleakala National Park on the Island of Maui. Because the danger was hidden and the warnings inadequate, she struck her head on a submerged rock, broke her neck and was rendered quadriplegic.

Heather Proud and her father filed an administrative claim with the United States Department of the Interior and the claim was denied on May 26, 1981. On September 2, 1981, the Plaintiffs brought an action in the United States District Court for the District of Hawaii against the United States under the Federal Tort Claims Act alleging that Heather Proud's injuries were caused by the negligence of the United States. On September 30, 1982 on the United States' Motion for Summary Judgment, the District Court dismissed the complaint without prejudice on the basis that the United States government was immune from liability for its negligence under the Hawaii Recreational Use Statute, Hawaii Revised Statutes Chapter 520, et seq.[2] Without a hearing, the trial court denied

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[2] The Plaintiffs were granted leave to amend the Complaint to allege willful and/or malicious conduct on the part of the United States.

the Plaintiffs' motion for reconsideration on November 15, 1982.

Plaintiffs chose not to amend and filed a Notice of Appeal on November 15, 1982. The appeal was dismissed by the Court of Appeals for the Ninth Circuit on April 26, 1983 on the grounds that the orders appealed from were not final and appealable. On June 10, 1983, the District Court entered a final judgment and order. Plaintiffs filed a Notice of Appeal to the Ninth Circuit Court of Appeals on June 21, 1983.

On January 12, 1984, the Ninth Circuit Court of Appeals affirmed the District Court's judgment.

Jurisdiction of the District Court was invoked under 28 U.S.C. §1346(b) and 2671-2680 and the fact that the Defendant is the United States government and responsible for the Haleakala National Park located on the Island of Maui, Hawaii, and had previously denied, through its Department of Interior, petitioners administrative claim.

REASONS FOR GRANTING THE WRIT

I. This case presents far reaching and important issues of construction of the Federal Tort Claims Act in circumstances where, in the context of recreational land, State law purposely imposes a higher duty of care on government landowners that it does on private landowners; and this case provides this Court with the opportunity to

give real meaning to the "like circumstances" language of the Federal Tort Claims Act.

II. The decision of the Ninth Circuit Court of Appeals is contrary to the clear intent of the Hawaii Recreational Use Statute, which was intended to strike a balance between the State's need to adequately protect its citizens and visitors from the negligence of government and to encourage private landowners to open private lands for public recreational use, and perverts the application and intent of the Federal Tort Claims Act by broadening, rather than restricting, the government's assertion of sovereign immunity.

III. The issues in this case are likely to reoccur throughout this country because a growing number of states rich in privately held recreational land are passing recreational use statutes and the Court's decision in this case will assist and guide the states in drafting and redrafting their statutes.

IV. This case is of tremendous importance to the people who live in and visit Hawaii because of Hawaii's unique National Parks and unusually high percentage of recreational land held by private estates and the United States Government.

This Court has recognized that the Federal Tort Claims Act represents "the cumulation of the long effort to mitigate unjust consequences of sovereign immunity from suit." *Feres v. United States,* 340 U.S. 135, 139, 71 S.Ct. 153, 95 L.Ed. 152 (1950). Accordingly, this Court has previously considered and rejected the proposition that the United States Government should be immune from

liability under the Federal Tort Claims Act for performing a governmental function in circumstances where the State or municipality would be immune under State law. *Indian Towing v. United States*, 350 U.S. 61, 76 S.Ct. 172, 100 L.Ed. 48 (1955); *Rayonier, Inc. v. United States*, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957). To hold otherwise would return us to the days when the King could do no wrong.

This case presents the Court with the opportunity to decide whether under the Federal Tort Claims Act, the Federal government should be immune from liability for performing a governmental function when under State law, the government would *not* be immune.[3]

The Ninth Circuit Court of Appeals has answered this question in the affirmative. The result is fundamentally

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[3] If this Court finds that the United States would be immune from liability under the Hawaii Recreational Use Statute, the court should also find that the statute is unconstitutional as applied, under the Supremacy Clause, Article XI, Section 2 of the United States Constitution. *McColloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Since the portion of the statute which defines land and purports to exclude the United States government from the exception to liability is not severable and was not meant to be severable from the rest of the statute, the entire statute must fall. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312-13, 56 S.Ct. 855, 873, 80 L.Ed. 1160 (1936); *Utah Power and Light Co. v. Pfost*, 286 U.S. 165, 184-85, 52 S.Ct. 548, 553, 76 L.Ed. 1038 (1932), *Gavett v. Alexander*, 477 F. Supp 1035, 1050 (1979).

The Court cannot sever and repair the state's statute at will, for to do so would be to ignore the primary goal of the Hawaii legislature. Accordingly, if the Court finds the government exception unconstitutional, then the whole statute must fall and the United States government would then, under the Federal Torts Claims Act be subject to liability on the basis of simple negligence.

unfair and not only defeats the goals of the Federal Tort Claims Act but also severely impinges on the State's ability to fairly serve the needs of its people and visitors and leaves Heather Proud, a quadriplegic due to the negligence of the United States, in failing to warn of a hidden danger without any legal remedy.

In 1969, the legislature of Hawaii passed the Recreational Use Statute, Chapter 520, Hawaii Revised Statutes.[4] The express purpose of the Act is to:

> Encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability towards persons entering thereon for such purposes.

H.R.S. §520-1.

To encourage private landowners to open up their lands to the public for recreational use, the legislature established a major exception to Hawaii negligence law[5] by providing that:

> An owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a danger-

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[4] The full text of the statute is reprinted in the Appendix. (Appendix 12).

[5] Hawaii law no longer allows the common law distinction between invitees and licensees to be determinative of the scope of occupier's liability, rather, a landowner owes a duty of reasonable care to all who may foreseeably enter. *Pickard v. City and County*, 51 Haw. 134, 452 P.2d 445 (1969). *Gibo v. City and County*, 51 Haw. 299, 459 P.2d 198 (1969).

> ous condition, use, structure or activity on such premises to persons entering for such purposes.

H.R.S. § 520-3.[6]

The legislature specifically excluded government owned lands from the exception to liability:

> 'Land' means land, roads, water, water courses, private ways and building, structure, and machinery or equipment when attached to such realty, *other than lands owner by the government.* (Emphasis added.)

H.R.S. § 520-2(1).

It is crystal clear that, by definition, land owned by "the government" is *excluded* from the statute and that government as landowner owes a duty of care. Nevertheless, the Ninth Circuit Court of Appeals held that the United States' tort liability is co-extensive with that of a private individual under State law and accordingly, since a private landowner would not be liable for Heather Proud's injuries, neither is the United States.[7]

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[6] The statute does not limit liability for willful or malicious failure to guard or warn against a dangerous condition, use, or structure which the owner knowingly creates or perpetuates and for willful or malicious failure to guard or warn against a dangerous activity which the owner knowingly pursues or perpetrates. H.R.S. 520-5(1).

[7] In so ruling, the Ninth Circuit relied heavily on its earlier opinion in *Simpson v. United States,* 652 F.2d 831 (9th Cir. 1981). The court noted that California Civil Code § 846 (California's Recreational Use Statute) did not specifically exclude government lands from its coverage and that California courts were divided on the issue of whether the statute applied to the government. The court found that the split among California courts to be irrelevant and held that since California Civil Code § 846 without doubt applied to private persons, it must, therefore, also apply in the same way to the United States.

The decisions of other courts in this topic are not helpful because, although many land rich Western states have

(Continued on following page)

This holding ignores the fact that the Federal Tort Claims Act provides in part that:

> The United States shall be liable respecting . . . tort claims in the same manner and to the same extent as a private individual *under like circumstances.*

(Emphasis added.) 28 U.S.C. § 2674 (1976).

Private individuals do not run national parks. It defies logic and fairness to equate the activities of the United States government with the activities of private individuals in the context of the Hawaii Revised Statutes. Since there are no similarly situated individuals, the reasonable approach would be to recognize that the Hawaii Recreational Use Statute does allow the United States government to be held liable for simple negligence.

Not only is this approach the most fair and logical, it is consistent with both the purpose and the language of the Federal Tort Claims Act. The purpose of the act

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(Continued from previous page)

passed statutes limiting liability to encourage private landowners to open up their lands for public recreational use, none known to petitioners have specifically excluded government lands from its coverage.

The Colorado statute, Colo. Rev. Stat. §§ 33-41-101 to 105 (1973), cited in *Otteson v. United States*, 622 F.2d 516 (10th Cir. 1980), does not exempt the government. The Nevada statute, Nev. Rev. Stat. § 41.510 (1981) cited in *Gard v. United States*, 594 F.2d 1230 (9th Cir. 1970) (per curiam), also does not exempt the government. The Pennsylvania statute, 68 P.S. Pa. §§ 477-1 to 8 (1980), cited in *Hahn v. United States*, 493 F. Supp. 57 (M.D. Pa. 1980), *aff'd* 639 F.2d 773 (3rd Cir. 1980), also does not exempt the government. Similarly, the Oregon statute, Ore. Rev. Stat. § 105.655, cited in *McClain v. United States*, 445 F. Supp. 770 (D. Ore. 1978), does not specifically exempt the government.

is to mitigate the unjust consequences of sovereign immunity from suit. To allow the United States to escape liability pursuant to a State statute which was clearly intended to reach a contrary result would be to allow one of the very same unjust consequences that the Act is meant to mitigate.

Also, to recognize that the United States operation of a National Park cannot reasonably be equated to the activities of private individuals would give real meaning to the "like circumstances" language in the Act. To hold otherwise is to ignore the Act's clear wording and purpose.

The Ninth Circuit Court of Appeals was wrong to believe that exempting the United States Government from Hawaii Recreational Use Statute would impermissibly allow the State of Hawaii to dictate the sovereign immunity of the United States.

The Federal Tort Claims Act was passed during an era in which the government enjoyed vast immunity from suit. To mitigate the harshness of sovereign immunity, the Congress of the United States enacted the Federal Tort Claims Act, and in doing so, it made the United States liable as a private person in similar circumstances would be under State law. *See*, generally, *Harding Federal Tort Claims* (1983), Vol. I, Chapter 2, at pp. 3-80.

When the Federal Tort Claims Act was enacted, many State and local governments were immune from suits for negligence. The subsequent revolution in state laws, by decision and statutory reform, abrogating governmental immunity for negligence actions, is part of the same reform movement which produced the Federal Tort Claims Act. Both the Federal Tort Claims Act and the Hawaii Recreational Land Use Statute embody the same public

policy: that is to protect the victim of governmental negligence by giving that person a cause of action against the government as a remedy. This common purpose, which is the product of the twentieth century legal reform, arose out of recognition of the fundamental unfairness of the doctrine of sovereign immunity and its inherent denial of the equal protection of the law.

Sovereign immunity is an antiquated concept which does not make sense. That is why the federal government adopted the Federal Tort Claims Act and Hawaii abrogated sovereign immunity to allow private citizens who are injured on State property to sue the State. To encourage public recreational use of private land, the State of Hawaii has taken the rational next step of leaving the government liable for its negligence on land open to the public while freeing the private landowner from similar liability.

It is a tragic and unnecessary irony that Heather Proud, who was intended to benefit by the act of Congress and the act of the Hawaii Legislature because she was hurt on government land, has instead been denied the remedy intended for her by an overly rigid, mechanistic and myopic interpretation of two statutes whose words were not sufficiently synchronized to achieve the result that both clearly intend.

Stated another way, were it not for the peculiar language of the Hawaii Recreational Land Use Act, Heather Proud would clearly be entitled to a legal remedy because she was hurt on government land. This remedy was intended for her and others like her by United States Congress. Certainly, Congress did not intend for a state to take that right away from her through an Act which

encouraged non-governmental landowners to open their land to the public. Heather Proud is like a drowning woman caught in a whirlpool left by the wake of two boats both moving in different directions, both intending to rescue her. The statutes which are designed to protect Heather should be interpreted to accomplish that purpose. They should not be interpreted in a way which deprives her of a right which both statutes intend to give her.

The Federal Tort Claims Act was "designed to build upon the legal relationships formulated and characterized by the States and, to that extent, the statutory scheme is exemplary of the general interstitial character of federal law." *Richards v. United States*, 369 U.S. 1, 6-7, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962).

In the area of land use and public safety, the State of Hawaii has taken great care to define the relationship between the public and the government. Given that the purpose of the Federal Tort Claims Act is to mitigate the harshness of the application of sovereign immunity, it would indeed be a perversion of the Act to defy recognition of the state's interests in keeping government lands safe for public use.

The legislature of Hawaii was acutely aware of both the need to encourage private landowners to open up their lands for recreational use and the need to protect its citizens and tourists from excesses of the government, including the federal government. The authors of Senate Bill 56 (the Hawaii Recreational Use Statute) intended the bill to encourage ***non-governmental*** property owners to make their property available for public recreational use and ***never intended*** that the act be applied to immunize local, state or federal governments. *See* the Affidavits of

Senators William E. Fernandez (Appendix 13) and Mamoru Yamasaki (Appendix 14). If the State legislature had any reason to believe that the Hawaii Recreational Use Statute would deprive citizens of the right to sue the federal government under the Federal Tort Claims Act for its control and maintenance of federal recreational land, the legislature would not have passed the bill. *Id.*

In the context of the Federal Tort Claims Act, the Ninth Circuit's decision in this case has put the State of Hawaii in the unconscionable position of having to choose between two evils. On one hand, the State of Hawaii seeks to benefit its citizens and the more than four million tourists who visit Hawaii each year by encouraging its many large private landowners to open up their land for public recreational use. Concurrently, the State of Hawaii wants to protect its citizens and its many tourists from governmental excesses and abuses regarding government land, given that the government is in a much better position than private landowners to absorb the costs, if any, of making their lands reasonably safe for recreational use. Both concerns are addressed in the recreational use statute. The Ninth Circuit's construction of the Hawaii Recreational Use Statute and the Federal Tort Claims Act, however, effectively precludes the State from achieving these rational goals.[8]

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[8] The Ninth Circuit's decision in this case also deprives Petitioners of equal protection of the law. Recreational statutes have been passed by states which are land rich. The majority of states have no such statutes and no need for any. If Heather Proud had been injured on federal land in any one of the majority of states which do not have a recreational use statute she would have had an adequate legal remedy against the United States.

CONCLUSION

The very purpose of the Federal Tort Claims Act is to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability. *Rayonier v. United States, supra.* In view of the presentation set forth above, we respectfully submit that this petition for writ of certiorari is meritorious and should be granted.

Respectfully Submitted,

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APPENDIX 1

No. 83-2114
Civ. No. 82-0331

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN PROUD, Individually and as Next Friend of HEATHER PROUD, a Minor,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

OPINION
(Filed Jan. 12, 1984)

Appeal from the United States District Court
for the District of Hawaii
Hon. Samuel P. King, District Judge, Presiding
Argued and Submitted December 12, 1983

Before: HUG, PREGERSON, and NORRIS, Circuit Judges

PREGERSON, Circuit Judge:

John Proud, individually and as next friend of Heather Proud, a minor, appeals the district court's dismissal of the complaint for failure to state a claim upon which relief can be granted. Plaintiff filed suit in federal court seeking damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 (1976 & Supp. V 1981), for injuries that Heather Proud sustained in a diving accident at Haleakala National Park.

The United States moved for dismissal and argued that, under the FTCA, the law of the State of Hawaii governs the federal government's liability—and therefore, that the state's Recreational Use Statute, Hawaii Rev. Stat. § 520 (1976), completely barred the claim.

The district court agreed and dismissed the action pursuant to Fed. R. Civ. P. 12(b) (6).

STANDARD OF REVIEW

In determining the liability of the United States, the district court interpreted Hawaiian law. We recently granted rehearing en banc to decide whether a "clearly wrong" or a de novo standard applies when the Ninth Circuit reviews a district court's determination of the forum state's law.[1] This issue need not detain us, however, because we must affirm under either standard.

ANALYSIS

Under the FTCA, the United States is liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (1976); *see also id.* § 1346(b) (1976 & Supp. V 1981) (conferring jurisdiction on district courts to hear money damages claims "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred"); *Richards v. United States*, 369 U.S. 1, 6 (1962) (interpreting FTCA as rendering fed-

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[1] *See Churchill v. F/V Supersonic*, No. 82-3644 (9th Cir. rehearing enbanc granted Dec. 19, 1983).

eral government "liable in tort as private individual would be under like circumstances").

Hawaii provides some exceptions protecting landowners from liability for injuries occurring on their property. Chapter 520 of the Recreational Use Statute limits the duty of landowners as follows:

> Except as specifically recognized by or provided in section 520-6, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

Hawaii Rev. Stat. § 520-3. Moreover, chapter 520 defines land as

> land, roads, water, water courses, private ways and buildings, structures, and machinery or equipment when attached to realty, *other than lands owned by the government.*

Id. § 520-2(1) (emphasis added). Appellants contend that, because of the definition of "land" in Hawaii Rev. Stat. § 520-2(1), the exemption from liability afforded private individuals should not be extended to the United States government in connection with land it owns.

But appellants overlook the fact that in enacting the FTCA, Congress—not the Hawaii Legislature—determined the tort liability of the United States. And the FTCA specifically provides that the federal government's tort liability is co-extensive with that of a private individual under state law.

We have previously addressed the question whether a state statute applied to federally, as well as privately,

held land. In *Simpson v. United States*, 652 F.2d 831 (9th Cir. 1981), plaintiff sued the United States under the FTCA for injuries he sustained in a national forest. The precise issue was whether Cal. Civ. Code § 846 (West 1982),[2] exempting property owners from liability for injuries sustained by persons using the property for recreational purposes, applied to federally held land. When we heard *Simpson*, several of the state's intermediate appellate courts had considered an analogous issue[3] and reached conflicting results. 652 F.2d at 833.

In concluding that Cal. Civ. Code § 846 limited the United State's liability, we thought that the conflict had no effect on our decision:

> How that split among the California courts is resolved is not pertinent to the issue pending here, for the Federal Tort Claims Act makes the United States liable for negligence in the same manner and to the

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[2] California Civil Code § 846 (West 1982) provides:

> An owner of any estate or any other interest in real property, whether possessory or non-possessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.
>
> . . . .
>
> This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn aganst a dangerous condition, use, structure or activity [] . . . or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

[3] The issue in those cases was whether Cal. Civ. Code § 846 exempted lands that California or its political subdivisions —such as counties and water districts—owned.

> same extent as a private individual would be in similar circumstances. 28 U.S.C. § 2674. Since California Civil Code § 846 doubtless applies to private persons, it must, therefore, also apply in the same way to the United States.

Simpson, 652 F.2d at 833 (citing *Phillips v. United States*, 590 F.2d 297 (9th Cir. 1979) (per curiam)).

In sum, the United States's liability under the FTCA is that of a private individual, regardless of what a state intends that liability to be. In the present case, the district court properly considered the tort liability of a similarly situated private individual. Under Hawaii Rev. Stat. § 520-3, a private landowner would not be liable for Heather Proud's injuries. Neither is the United States.

The judgment is AFFIRMED. Each side shall bear its own costs.

APPENDIX 2

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CIVIL NO. 81-0331

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

JOHN PROUD, Individually, and as Next Friend of HEATHER PROUD, a Minor,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

(Filed June 10, 1983)

This Court having granted Defendant's Motion to Dismiss Plaintiff's Complaint for failure to state a claim upon which relief may be granted;

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered for Defendant and against Plaintiff.

DATED: Honolulu, Hawaii, June 9, 1983.

Samuel P. King
Judge of the Above-Entitled Court

Approved as to Form:

/s/ Mark J. Bennett
MARK J. BENNETT
Attorney for Defendant

APPENDIX 3

NO. 82-4692
D.C. #82-0331

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN PROUD, Individually and as Next Friend of HEATHER PROUD, a Minor,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

OPINION

(Filed April 26, 1983)

Appeal from the United States District Court
for the District of Hawaii
District Judge Samuel P. King, Presiding

[Argued and Submitted April 15, 1983]

Before: BROWNING, WRIGHT and WALLACE, Circuit Judges.

PER CURIAM:

This is a negligence action against the United States for injuries the minor plaintiff sustained diving into a natural pool in Haleakala National Park. The district court dismissed the complaint with leave to amend within 60 days, reasoning that Hawaii's recreational land use law precluded relief for simple negligence. *See* Hawaii Rev. Stat. §§ 520-2(1), -3.

The appealed order, which dismissed the complaint but not the action, is not final and appealable unless special circumstances demonstrate that the trial court found plaintiffs could not save the action by any amendment of the complaint they could reasonably be expected to make. *California v. Harvier,* No. 80-5323, slip op. 961, at 962 (9th Cir. March 4, 1983).

Here, plaintiffs argued below that they could state a claim for willful or malicious failure to guard or warn. *See* Hawaii Rev. Stat. § 520-5(1). They could have saved their action by amending the complaint to make this claim explicit. It is immaterial that plaintiffs decided not to amend. The district court was not advised of that decision and no final judgment was entered.

As the exception to the rule of nonappealability was not satisfied, the order was not appealable. The appeal is dismissed.

APPENDIX 4

CIVIL NO. 81-0331

IN THE UNITED STATES COURT
FOR THE DISTRICT OF HAWAII

JOHN PROUD, etc., et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER DENYING MOTION FOR RECONSIDERATION

(Filed November 15, 1982)

Plaintiffs in this action have moved the Court to reconsider that portion of its Order of September 21, 1982, granting the defendant's Motion to Dismiss for failure to state a claim for which relief may be granted.

The Court, having reviewed the arguments and memoranda of counsel and the record in this case, can find no grounds upon which to grant the plaintiffs' motion. This case is ruled by the provisions of the Federal Tort Claims Act, which state that the federal government is to be held liable to the same extent as a private individual. Following the Ninth Circuit's holding in *Simpson v. United States,* 652 F.2d 831 (9th Cir. 1981), it is irrelevant what the State of Hawaii thought or meant to do with respect to the federal government in enacting Hawaii Rev. Stat. § 520-2(1).

Accordingly, IT IS HEREBY ORDERED AND ADJUDGED that the plaintiffs' Motion for Reconsideration is DENIED.

DATED: Honolulu, Hawaii, November 15, 1982.

/s/ Samuel P. King
United States District Judge

APPENDIX 5

JUDGMENT ON DECISION BY THE COURT

For the
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil Action Docket No. 81-0331

JOHN PROUD, etc., et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

(Filed September 30, 1982)

This action came on for (hearing) before the court, United States District Judge Samuel P. King presiding. The issues having been duly (heard) and a decision having been duly rendered, it is ordered and adjudged that Plaintiffs Complaint is Dismissed Without Prejudice and the Plaintiffs shall have 60 Days to file an Amended Complaint.

Dated at: Honolulu, Hawaii

cc: David Schutter, Judith Pavey
and U. S. Attorney

Date: September 30, 1982

Walter A. Y. H. Chinn
Clerk of the Court

/s/ Ione P. Akana
Chief Deputy Clerk

APPENDIX 6

(SEAL)

UNITED STATES
DEPARTMENT OF THE INTERIOR

Office of the Solicitor
San Francisco Field Office
450 Golden Gate Avenue, Box 36064
San Francisco, California 94102

May 26, 1981

(Received May 29, 1981, David C. Schutter)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

TC-SF-81-34

David C. Schutter
Attorney at Law
Kawaiahao Plaza — Suite 618
567 South King Street
Honolulu, Hawaii 96813

Dear Sir:

We have reviewed the claim that you have filed against the United States in the amount of $10,000,000.00 on behalf of your client, Heather Proud, by her father John Proud. Heather Proud's claim is for injuries she allegedly sustained in diving into the pool above Makahiku Falls in the Oheo Gulch area of Haleakala National Park on March 30, 1979.

Under the Federal Tort Claims Act, the United States may settle a claim for damages caused by the negligent act or omission of a Government employee, while acting within the scope of his employment, under circumstances

where the United States, if a private person, would have been liable.

After a careful review of your client's claim, we have determined that this accident was not caused by the negligence of any United States Government employee. Accordingly, while we sincerely regret this tragic accident, your client's claim is denied.

Because this determination constitutes a denial of your client's claim, you are advised that your client is entitled to resubmit her claim together with the reasons for the resubmission to this office within six months from the date of mailing of this determination, or your client may institute an action in the United States District Court within six months from the date of mailing of this determination.

Sincerely yours,

/s/ Ralph G. Mihan
Field Solicitor

cc:

Superintendent, Haleakala
Regional Director, Western Region, NPS

APPENDIX 7

Judgment

No. 83-2114
DC CV 81-0331

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN PROUD, Individually and as Next Friend of HEATHER PROUD, a Minor,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

(Filed February 9, 1984)

APPEAL from the United States District Court for the District of Hawaii.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed. Each party to bear its own cost.

A True Copy
Attest February 3, 1984
PHILLIP P. WINBERRY
Clerk of Court

by: /s/ Eliza Lau
Deputy Clerk

Filed and entered January 12, 1984.

APPENDIX 8

UNITED STATES CONSTITUTION
ARTICLE VI SECTION 2

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

APPENDIX 9

UNITED STATES CONSTITUTION
AMENDMENT XIV
SECTION 1

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX 10

TITLE 28—UNITED STATES CODE SECTION 1346

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or

omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 or section 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

APPENDIX 11

TITLE 28--UNITED STATES CODE SECTION 2674

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

APPENDIX 12

[§520-1] *Purpose.* The purpose of this chapter is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes. [L 1969, c 186, §1]

[§520-2] *Definitions.* As used in this chapter:

(1) "Land" means land, roads, water, water courses, private ways and buildings, structures, and machinery or equipment when attached to realty, other than lands owned by the government.

(2) "Owner" means the possessor of a fee interest, a tenant, lessee, occupant, or person in control of the premises.

(3) "Recreational purpose" includes, but is not limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites.

(4) "Charge" means the admission price or fee asked in return for invitation or permission to enter or go upon the land.

(5) "House guest" means any person specifically invited by the owner or a member of his household to visit at the owner's home whether for dinner, or to a party, for conversation or any other similar purposes including for recreation, and include playmates of the owner's minor children. [L 1969, c 186, §2]

[§520-3] *Duty of care of owner limited.* Except as specifically recognized by or provided in section 520-6, an owner of land owes no duty of care to keep the premises

safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes. [L 1969, c 186, §3]

[§520-4] *Liability of owner limited.* Except as specifically recognized by or provided in section 520-6, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

(1) Extend any assurance that the premises are safe for any purpose.

(2) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.

(3) Assume responsibility for or incur liability for any injury to person or property caused by an act of omission or commision of such persons. [L 1969, c 186, §4]

[§520-5] *Exceptions to limitations.* Nothing in this chapter limits in any way any liability which otherwise exists:

(1) For wilful or malicious failure to guard or warn against a dangerous condition, use, or structure which the owner knowingly creates or perpetuates and for wilful or malicious failure to guard or warn against a dangerous activity which the owner knowingly pursues or perpetuates.

(2) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that in the case of land leased to the State or a political subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

(3) For injuries suffered by a house guest while on the owner's premises, even though the injuries were incurred by the house guest while engaged in one or more of the activities designated in section 520-2(3). [L 1969, c 186, §5]

[§520-6] *Persons using land.* Nothing in this chapter shall be construed to:

(1) Create a duty of care or ground of liability for injury to persons or property.

(2) Relieve any person using the land of another for recreational purposes from any obligation which he may have in the absence of this chapter to exercise care in his use of such land and in his activities thereon, or from the legal consequences of failure to employ such care. [L 1969, c 186, §6]

[§520-7] *Rights.* No person shall gain any rights to any land by prescription or otherwise, as a result of any usage thereof for recreational purposes as provided in this chapter. [L 1969, c 186, §7]

[§520-8] *Rules and regulations.* The department of land and natural resources shall make rules and regulations pursuant to chapter 91, as it deems necessary to carry out the purpose of this chapter. [L 1969, c 186, §8]

APPENDIX 13

EXHIBIT A

CIVIL NO. 81-0331

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

JOHN PROUD, Individually and as Next Friend of HEATHER PROUD, a Minor,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

SUPPLEMENTAL AFFIDAVIT OF
SENATOR WILLIAM E. FERNANDEZ

STATE OF HAWAII)
) SS.
COUNTY OF KAUAI)

SENATOR WILLIAM E. FERNANDEZ having been first duly sworn on oath, deposes and says:

1. He was a member of the Fifth Legislature of the State of Hawaii which convened in 1969, and was the co-author, together with Senator Mamoru Yamasaki, of Senate Bill No. 56 which was subsequently adopted as Chapter 520 of the Hawaii Revised Statutes.

2. In the course of the preparation and passage of Senate Bill No. 56, he was involved in numerous discussions, conferences, meetings, and similar activities with his co-legislators to refine the form and content of the bill.

3. Based upon his extensive contacts within the legislature and his own personal knowledge, he is able to

state that the legislative intent of said bill (as finally adopted into law as Chapter 520 of the Hawaii Revised Statutes), was to encourage non-governmental property owners to make their property available to the general public for recreational purposes. It was also the intent of the legislature to confine the limitations on liability contained in the above-said bill to non-governmental property owners and not to any local, state, or federal governmental body.

4. Based upon his personal knowledge as described above, he further states that it was the intent of the legislature to pass this law in its entirety and that if the legislature of the State of Hawaii had had any reason to believe that the passage of this law would have deprived residents of Hawaii of the opportunity to sue the Federal government under the Federal Tort Claims Act for its control and maintenance of Federal recreational lands, the legislature would not have passed Senate Bill No. 56 and he, as the co-author of that bill, would not have introduced it.

5. In addition, based upon his personal knowledge as described above, he further states that it was the intent of the legislature to pass this law *in its entirety* and that if any portions of the law were struck down as being unconstitutional the legislature would not have separately passed the remaining portions.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Senator William E. Fernandez

Subscribed and sworn to before me
this 16th day of September, 1982.

/s/ Walter M. Omoto
Notary Public, State of Hawaii

My commission expires: 10/30/84

APPENDIX 14

EXHIBIT B

CIVIL NO. 81-0331

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

JOHN PROUD, Individually and as Next Friend of HEATHER PROUD, a Minor,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

SUPPLEMENT AFFIDAVIT OF
SENATOR MAMORU YAMASAKI

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

SENATOR MAMORU YAMASAKI, having been first duly sworn on oath, deposes and says:

1. He is presently and has been so at all times relevant to this affidavit and the facts contained there in a member of the legislature of the State of Hawaii.

2. As a member of the Fifth Legislature which convened in 1969, he was the co-author, together with Senator William E. Fernandez, of Senate Bill No. 56 which was subsequently adopted as Chapter 520 of the Hawaii Revised Statutes.

3. In the course of the preparation and passage of Senate Bill No. 56, he was involved in numerous discussions, conferences, meetings, and similar activities with his co-legislators to refine the form and content of the bill.

4. Based upon his extensive contacts within the legislature in regard to this bill and his own personal knowledge, he is able to state that the legislative intent of the bill as finally adopted into law as Chapter 520 of the Hawaii Revised Statutes, was to encourage non-governmental property owners to make their property available to the general public for recreational purposes. It was the intent of the legislature to restrict the limitations on liability contained in the above-said bill to non-governmental property owners and *not* to any local, state, or federal governmental body.

5. Based upon his personal knowledge as described above, he further states that it was the intent of the legislature to pass this law in its entirety and that if any portions of the law were struck down as being unconstitutional the legislature would not have passed the remaining portions of the law themselves.

6. Based upon his personal knowledge as described above, he further states that it was the intent of the legislature to pass this law in its entirety and that if the legislaure of the State of Hawaii had had any reason to believe that the passage of this law would have deprived residents of Hawaii of the opportunity to sue the Federal government under the Federal Tort Claims Act for its control and maintenance of Federal recreational lands, the legislature would not have passed Senate Bill No. 56 and he, as the co-author of that bill, would not have introduced it.

6. Your affiant further states that it was never the intent of the legislature to have Chapter 520 provide any limitations or exceptions to government owned land, and

certainly not in any case where such lands had already been dedicated to a public recreational use.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Senator Mamoru Yamasaki

Subscribed and sworn to before me
this 28th day of September, 1982.

/s/ Georgina K. Kawamura
Notary Public, State of Hawaii

My commission expires: 11/15/85

Office - Supreme Court, U.S.
FILED
MAY 29 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1636

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN PROUD, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1636

JOHN PROUD, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner argues that the court of appeals erred in holding that the Hawaii recreational use statute, which immunizes private landowners from negligence suits for injuries occurring on lands they open to the public, also immunizes the United States from a suit under the Federal Tort Claims Act, for an injury that occurred in a national park located in Hawaii.

1. On March 30, 1979, petitioner's daughter struck her head on a submerged rock when diving into a fresh water pool in the Haleakala National Park in Hawaii (Pet. App. 1). Petitioner filed an administrative claim pursuant to 28 U.S.C. 2675 with the Department of the Interior for the injuries sustained by his daughter, alleging that the Park

Service was negligent in failing to warn divers at the Park of the submerged rocks. The administrative claim was denied (Pet. App. 12-13).

Petitioner then filed suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, in the United States District Court for the District of Hawaii, alleging that the injuries were caused by the negligence of the United States. The government moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The government relied upon Hawaii's recreational use statute, Hawaii Rev. Stat. § 520 (1976), which provides that private owners of land owe no duty of care to keep their land safe or to post warnings for the benefit of those who use the land for recreation (Pet. App. 20-21).

The district court dismissed the complaint without prejudice (Pet. App. 11) to allow petitioner to amend his complaint to allege that his daughter's injuries were caused by willful or malicious conduct by employees of the United States; Hawaii's recreational use statute only immunizes the landowner from injuries caused by negligence. Petitioner declined to amend his complaint and instead moved for reconsideration. That motion was denied and final judgment was entered for the government (Pet. App. 9-10).

2. The court of appeals affirmed (Pet. App. 1-5). The court explained that the liability of the United States under the Federal Tort Claims Act is limited " 'to the same extent as a private individual under like circumstances.' " 28 U.S.C. 2674 (Pet. App. 2). The court then looked to Hawaii law to determine what liability a landowner incurs for injuries sustained on his property and concluded that a private landowner owes no duty of care to those who enter his land for recreational purposes. Hawaii Rev. Stat. § 520-3 (1976) (Pet. App. 3). Accordingly, the court of appeals concluded

that the United States owed no duty of care to petitioner for injuries sustained by his daughter within the national park. The court rejected as irrelevant petitioner's contention that the Hawaii legislature did not intend the recreational use immunity to extend to governmental defendants; instead, the court reasoned that "Congress — not the Hawaii Legislature — determined the tort liability of the United States" (Pet. App. 3).

3. Petitioner contends (Pet. 4-13) that the court of appeals erred in granting the United States a limited immunity for injuries occurring on federal lands, because the court disregarded the clear intent of the Hawaii legislature, which was to deny the recreational use immunity to lands owned by the government. The decision below is, however, a correct application of the "private person" limitation on the government's waiver of sovereign immunity.

The Federal Tort Claims Act confers jurisdiction on United States district courts over suits for personal injuries (28 U.S.C. 1346(b))

> caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

See also 28 U.S.C. 2674. Petitioner does not dispute, nor could he, that the Hawaii recreational use statute immunizes private landowners from tort liability under circumstances identical to this case. Accordingly, under the plain meaning of the statute, the United States is not liable for petitioner's daughter's injury. Indeed, every court of appeals that has considered the issue has concluded that the United States is entitled to the same immunity from suit as a private person enjoys under a state's recreational use statute. See

Mandel v. *United States*, 719 F.2d 963 (8th Cir. 1983) (Arkansas statute); *Morgan* v. *United States*, 709 F.2d 580 (9th Cir. 1983) (Washington statute); *Jones* v. *United States*, 693 F.2d 1299 (9th Cir. 1982) (Washington statute); *Simpson* v. *United States*, 652 F.2d 831 (9th Cir. 1981) (California statute); *Otteson* v. *United States*, 622 F.2d 516 (10th Cir. 1980) (Colorado statute); *Gard* v. *United States*, 594 F.2d 1230 (9th Cir.), cert. denied, 444 U.S. 866 (1979) (Nevada statute).

Nor is a different result justified because the Hawaii legislature did not intend to limit the liability of the United States under its recreational use statute. Congress did not waive the sovereign immunity of the United States to the extent allowed by the state legislature of the place where the injury occurred. Instead, Congress permitted tort suits against the federal government only to the extent the state permitted private individuals to be sued. See *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 319 (1957). Accordingly, the court of appeals was clearly correct in holding that the Hawaii statutory provision that would impose liability on government landowners was wholly irrelevant to the liability of the United States under the FTCA.[1]

---

[1]Petitioner asserts (Pet. 6 n.3) that the conclusion that the United States is immune somehow requires the Court to declare the entire state recreational use statute unconstitutional. But this case raises no constitutional issues. The question of whether the United States is liable under 28 U.S.C. 1346(b) and 2674 is strictly a matter of the proper construction of a federal statute. Thus, the outcome of this case in no way undermines the State's ability to subject itself and its local governments to tort suits for injuries occurring on government lands.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1984

DOJ-1984-05